87-1380 (1)

No. ___

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

TIPPERARY REFINING CO.

Petitioner,

v.

THE UNITED STATES

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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QUESTION PRESENTED

Whether the court of appeals erred, and refused to follow this Court's decision in *The Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), in ruling that the Economic Stabilization Act impliedly repealed petitioner's Tucker Act remedy for breach of contract, leaving petitioner with no remedy whatsoever for the Department of the Interior's breach of an express, written contract.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Tipperary Refining Company[1] ("Tipperary") hereby petitions for a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The per curiam decision of the Court of Appeals for the Federal Circuit has been reported at 833 F.2d 301. It is reprinted in the appendix *infra* at 1a.

1 Pursuant to Sup. Ct. R. 28.1, Petitioner notifies the Court of the following affilated corporations: Tipperary Corporation; Tipperary Oil and Gas Corporation; Heritage Development; Tipperary Oil and Gas Corporation of Michigan; Tipperary Oil & Gas Corporation of California; Tipperary Oil and Gas Corporation of New York; Tipperary Oil Trading; Burro Pipeline; Tipperary Pipeline; Sunburst Energies, Inc.; Sunburst Gathering, Inc.; and Tipperary Petroleum Company.

The opinion of the United States Claims Court has been reported at 11 Cl. Ct. 572 (1987), and is reprinted in the appendix *infra* at 3a.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Court of Appeals, which was entered on November 17, 1987, is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1491. Claims against United States generally . . .

(a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1353. Federal purchase and disposition of oil and gas

* * * * * *

(b) Sale of oil by United States to public; disposition of oil to small refiners; application of other laws

(1) The Secretary, except as provided in this subsection, may offer to the public and sell by competitive bidding for not more than its regulated price, or, if no regulated price applies, not less than its fair market value, any part of the oil (A) obtained by the United States pursuant to any lease as

royalty or net profit share, or (B) purchased by the United States pursuant to subsection (a)(2) of this section.

* * * * *

(3) The Secretary may only sell or otherwise dispose of oil described in paragraph (1) of this subsection in accordance with any provision of law, or regulations issued in accordance with such provisions, which provide for the Secretary of Energy to allocate, transfer, exchange, or sell oil in amounts or at prices determined by such provision of law or regulations.

Economic Stabilization Act, § 211. Judicial Review

(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the cases shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code.

STATEMENT OF THE CASE

This case involves the Department of the Interior's disregard of a contractual obligation and the Court of Appeals' ruling that because Congress has impliedly repealed the Tucket Act's applicability to such contracts, petitioner has no remedy at all for the government's breach of that obligation.

In the Outer Continental Shelf Lands Act ("OSCLA"), Congress required the Department of the Interior to sell federal royalty crude oil to small refiners at a price no greater than that permitted under the Department of Energy's ("DOE") price control regulations, 43 U.S.C. § 1353(b)(3). Petitioner entered into a written contract with Interior for the purchase of such crude oil. The price term of that contract, tracking OCSLA verbatim, required Interior to sell petitioner crude oil "for no more than its regulated price." As in OCSLA, "regulated price" was defined as "the highest price permitted under" the DOE price control regulations. The contract thus embodied an explicit promise by Interior to sell crude oil at a price no greater than the DOE regulated price. Moreover, because the Tucker Act has traditionally provided a right of action against the government for actions founded upon a contract with the government, the contract also embodied an implicit promise of the availability of this traditional remedy for any breach of the contract.

The Claims Court dismissed petitioner's action for breach of contract, however, ruling that because Congress granted district courts exclusive jurisdiction to enforce the Department of Energy's price control regulations, Congress implicitly withdrew the Claims Court's Tucker Act jurisdiction to consider a claim for breach of contract. The Claims

Court reasoned that because the price control regulations might have to be interpreted and/or applied in order to determine whether the contract had been breached, petitioner's Tucker Act claims "arise under the DOE pricing regulations." (App. at 10a). Thus, the Claims Court refused to enforce the contract and refused to recognize that through the act of making a commitment in an express written contract, Interior subjected itself to Tucker Act jurisdiction for enforcement of that contract. The Federal Circuit affirmed on the basis of the Claims Court's opinion.

The Temporary Emergency Court of Appeals, however, had previously ruled, on two separate occasions, that neither the ESA nor the EPAA provide a right of action against the government for violation of the DOE's pricing regulations. This Court has declined to review those decisions. The result is that the ruling below has left petitioner without any remedy for the government's breach of OCSLA's explicit command and the express covenant in its contract with petitioner that it sell crude oil to petitioner at a price no greater than the DOE regulated price.

BACKGROUND

Under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq*., the Secretary of the Interior is authorized to grant oil and gas leases on federally owned or controlled lands. The Secretary may take royalties accruing under the leases "in kind" and may sell the oil to small independent refiners, such as petitioner.

In 1978, Congress amended OCSLA to require Interior to comply with "any provision of law, or regulations issued in accordance with such provisions, which provide for

the Secretary of Energy to allocate . . . oil in amounts or at prices determined by such provision of law or regulations." 43 U.S.C. § 1353(b)(3). In particular, the Secretary was authorized to sell crude oil "for not more than its regulated price . . ." 43 U.S.C. § 1353(b)(1). The statute went on to state that "[a]s used in this section, the term 'regulated price' means the highest price at which oil [may] be sold pursuant to the Emergency Petroleum Allocation Act of 1973 . . . and any rule or order issued under such Act."

The Emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. § 751 *et seq.*, required the President (or his designee) to promulgate regulations governing the maximum price that could be charged for crude oil and refined petroleum products. These price control regulations remained in effect until their revocation on January 28, 1981, by Executive Order No. 12287, 46 Fed. Reg. 9909 (January 30, 1981).

By contract dated June 5, 1980, Interior agreed, under authority of the 1978 OCSLA amendments, to sell Tipperary royalty oil produced from federal leases on the Outer Continental Shelf. Article V of the Contract, which governed the price to be charged for the crude oil, was a verbatim restatement of OCSLA, 43 U.S.C. § 1353(b)(1). Thus, in Article V, Interior made a contractual commitment to sell petitioner crude oil "for no more than its regulated price." As in OCSLA, Article V of the contract defined "regulated price" as the highest price permitted under the EPAA and rules and orders issued pursuant to the EPAA.

PROCEEDINGS BELOW

Tipperary brought an action against the United States in the United States District Court for the Western District of Texas, under the Economic Stabilization Act ("ESA"), 12 U.S.C. § 1904 note, alleging that Interior had violated the EPAA and that Interior had breached its crude oil sales contract with Tipperary.

While the case was pending in the district court, the Temporary Emergency Court of Appeals, the court with exclusive appellate jurisdiction over cases "arising under" the ESA, the EPAA, and the EPAA regulations, ruled that in enacting the ESA, Congress did not waive sovereign immunity, and consequently did not provide a right of action for damages against the United States. *Lunday-Thagard Co. v. United States Dep't of Interior*, 773 F.2d 322 (TECA 1985), *cert. denied*, 474 U.S. 1055 (1986).

As a result, the district court dismissed those counts of Tipperary's complaint seeking recovery of overcharges resulting from violations of the EPAA regulations. The count alleging breach of contract, however, was dismissed for lack of subject matter jurisdiction, without prejudice to its refiling in the United States Claims Court, which has exclusive jurisdiction over Tucker Act claims in excess of $10,000.

Accordingly, on May 6, 1986, Tipperary filed the present action in the Claims Court for breach of contract.[2] The United States moved to dismiss for lack of subject matter

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2 In addition to the claim for breach of contract, in separate counts, the complaint invoked the Tucker Act jurisdiction of the Claims Court by alleging that Interior violated OSCLA, that Interior unlawfully exacted money belonging to Tipperary and that Interior took Tipperary's money without just compensation in violation of the fifth amendment.

jurisdiction. The government did not deny that the contract between Interior and petitioner provided that the price to be charged for crude oil would be no greater than the DOE regulated price. Nor did the government deny that the Tucker Act establishes a cause of action against the United States for breach of contract, provides jurisdiction for such an action in the Claims Court, and constitutes a long-standing, broad, unequivocal waiver of sovereign immunity whenever the government chooses to make contractual commitments. The government did not even contend that it complied with the terms of the contract. Rather, the government argued that petitioner's action was one solely to enforce the DOE pricing regulations, not one for breach of contract.

By judgment dated January 27, 1987, the Claims Court granted the government's motion and dismissed Tipperary's complaint. The court ruled that "the statutory claims dominate the Tucker Act issues," and, as a result, Tipperary's claims "arise under the DOE pricing regulations." (App. at 10a). The court went on to note that the ESA grants exclusive jurisdiction to district courts to enforce the EPAA and regulations promulgated pursuant thereto. Although recognizing that the Tucker Act is not mentioned in either the ESA, EPAA or their legislative histories (App. at 12a), the court concluded that "Congress withdrew the jurisdiction this court otherwise would have had under the Tucker Act." (App. at 10a-11a).[3] The Federal Circuit affirmed on the basis of the Claims Court's opinion.

3 The government also contended that petitioner failed to exhaust administrative remedies. The court below declined to rule on this issue for the period DOE price controls were in effect.

REASONS FOR GRANTING THE WRIT

This is a case in which an agency of the United States sold crude oil to a small, independent oil refiner at prices in excess of both the regulatory price ceiling and the price term of the parties' express written contract, and no court will entertain an action to enforce the regulations or the contract.

According to the Federal Circuit, petitioner's Tucker Act remedy for breach of contract was implicitly repealed by the enactment of the Economic Stabilization Act - the statute governing actions to enforce the price control regulations. In so ruling, the court below disregarded this Court's decision in *The Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974), which held that a later enacted statute will not be interpreted as repealing the Tucker Act, by implication, unless there is a "positive repugnancy" between the later enacted statute and the Tucker Act. There is no conceivable "repugnancy" between a statute governing judicial enforcement of a regulatory scheme and Tucker Act enforcement of a promise made in a written contract between a federal agency and a private party.

The ruling below was premised upon the lower court's assumption that petitioner's Tucker Act claims are not Tucker Act claims at all, but rather ones that "arise under the DOE pricing regulations." (App. at 10a). This premise, however, disregards this Court's decision in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 106 S. Ct. 3229, 3233 (1986), which held that a claim cannot "arise under" under a statute that does not provide a "private, federal cause of action for [its] violation." The Temporary Emergency Court of Appeals, however, has twice ruled that petitioner has no cause of action against Interior under the ESA and the EPAA.

Transamerican Natural Gas Corp. v. United States Dep't of Interior, 816 F.2d 689 (TECA), *cert. denied*, 108 S.Ct. 198 (1987); *Lunday-Thagard Co. v. United States Dep't of Interior*, 773 F.2d 322 (TECA 1985), *cert. denied*, 474 U.S. 1055 (1986). Thus, the cause of action here could not "arise under" the ESA or the EPAA, as the court below incorrectly concluded. Rather, it arose under the express, written contract between petitioners and Interior and by the long-standing Tucker Act remedy for claims against the United States founded "upon any express or implied contract with the United States." This Court has long recognized that the Tucker Act waiver of sovereign immunity for any "civil action or claim against the United States . . . founded upon . . . any express or implied contract with the United States" is "the widest and most unequivocal waiver of federal immunity from suit." *United States v. Mitchell*, 463 U.S. 206, 215 (1983). If there were no such waiver, contracts with the government would be unenforceable and no one would enter into such contracts. Yet, that is the very result of the rulings in this case.

Congress simply could not have intended to allow the federal government to go scot free for its own violations of the crude oil pricing regulations that the government has enforced against others. Through the Outer Continental Shelf Lands Act, Congress explicitly required the Interior Department to adhere to the regulated price in its sales of crude oil. Moreover, as the court below recognized, Congress gave no indication whatever of any intention to disallow the traditional Tucker Act remedy for breach of contract in a case like the instant case. The United States Department of the Interior, however, has chosen to disregard both the unequivocal congressional requirement, embodied in the OCSLA,

and the express terms of the Contract by brushing them off as mere technicalities.[4]

The effect of the rulings by the Federal Circuit and the Temporary Emergency Court of Appeals is that petitioner has no remedy for breach of its contract. Only this Court can resolve this jurisdictional issue and permit petitioner to seek redress for breach of an express, written contract.

Neither The Economic Stabilization Act, The Emergency Petroleum Allocation Act Nor Any Other Statute Repealed Petitioner's Tucker Act Remedy For Breach Of Contract

A. The *Regional Rail* Rule

The court below ruled that petitioner's Tucker Act remedy had been repealed by the ESA, although nothing in the ESA or its legislative history ever mentions the Tucker Act. This ruling simply ignores this Court's decision in *The Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), which held that a statute enacted after the Tucker Act will not be construed as implicitly repealing the Tucker Act unless there is a "positive repugnancy" between the two statutes, rendering them incapable of coexistence.

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4 Throughout the course of this litigation, Interior has stated on numerous occasions that any violations of the pricing regulations it may have committed were only "technical" violations. *E.g.*, Defendant's Motion To Dismiss at 8, n.8, Tipperary Refining Co. v. United States, 11 Cl. Ct. 572 (1987) *aff'd*, 833 F.2d 301 (Fed. Cir. 1987) (a copy of the Motion has been lodged with the Clerk). This very type of "technical" violation has given rise to enforcement efforts by DOE against private parties that have recovered billions of dollars. *See, e.g.*, United States v. Exxon, 773 F.2d 1240, 1246 (TECA 1985), *cert. denied*, 474 U.S. 1105 (1986).

Unlike the instant case, which involves a purported conflict between a specialized procedure for resolving disputes under the EPAA and a remedy for breach of contract, the *Regional Rail* case arose in response to a claimed conflict between a noncontractual action in the Court of Claims and a proceeding in a specialized tribunal (the Special Court) established to resolve disputes arising under the Regional Rail Reorganization Act of 1973. This Court was called upon to consider the question of whether the Rail Act withdrew a Tucker Act remedy. The Court indicated that the question to be addressed is not whether the later enacted statute expresses "an affirmative showing of congressional intent to permit recourse to a Tucker Act remedy. Rather, it is whether Congress has in the [later Act] *withdrawn* the Tucker Act grant of jurisdiction to the Court of Claims . . . ." *Id.* at 126 (emphasis added).

Applying these principles, the Court concluded that the Rail Act did not repeal Tucker Act remedies implicitly. The Court first noted that nothing in the Rail Act or its legislative history indicated that Congress intended to withdraw a Tucker Act remedy. "The most that can be said is that the Rail Act is ambiguous on the question." 419 U.S. at 133. Applying the canon of construction that repeals by implication are disfavored, the Court found the two acts to be capable of coexistence and each, therefore, to be effective. 419 U.S. at 133-134. In reaching this conclusion, the Court quoted the ruling of the Special Court with approval:

> A new statute will not be read as wholly or even partially amending a prior one unless there exists a 'positive repugnancy' between the provisions of the new and those of the old that cannot be

> reconciled . . . . This principle rests on a sound foundation. Presumably Congress has given serious thought to the earlier statute, here the broadly based jurisdiction of the Court of Claims. Before holding that the result of the earlier consideration has been repealed or qualified, it is reasonable for a court to insist on the legislature's using language showing that it has made a considered determination to that end . . . .

419 U.S. at 134 (quoting *In re Penn Cent. Transp. Co.*, 384 F. Supp. 895, 943 (1974)).

The significance of the Court's ruling is illuminated further when contrasted to Justice Douglas' dissent. Justice Douglas, noting the Rail Act established both a Special Court with exclusive jurisdiction over all aspects of the Final System Plan for the railroads contemplated by the Act and a special expedited procedure to govern the handling of all cases before the Special Court, concluded:

> *A suit in the Court of Claims would be quite an odd appendage to the streamlined judicial procedures just described.* The language of § 209(b) vesting in the Special Court "all judicial proceedings with respect to the final system plan" immediately raises doubt that a Tucker Act remedy is compatible with the Act. The doubt is amplified when one looks at the entire scheme of judicial participation. I do not think that Congress, in setting up a Special Court, consolidating proceedings, limiting appeals, and demanding expeditious decisions, intended at the same time

> to permit yet another round of litigation on the compensation question to begin in the Court of Claims after all the procedures mandated by the Rail Act had been exhausted.

419 U.S. at 170-71 (emphasis added).

However, seven members of this Court disagreed with Justice Douglas's analysis of the two statutes. Notwithstanding his concerns, the majority concluded that a Tucker Act remedy simply was not inconsistent with a parallel compensation remedy under the Rail Act. In short, the Court decisively rejected the claim that the mere existence of a specialized tribunal with exclusive jurisdiction, designed to attain speed and consistency of decision, provided a sufficient basis, in and of itself, for inferring a Congressional repeal of existing Tucker Act remedies.

The principles articulated in *Regional Rail* have been consistently followed by this Court in the intervening years. The most recent example is the Court's decision in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), which involved the relationship between the Tucker Act and the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). In that case, the lower court ruled that an exclusive statutory procedure for compensation demonstrated a congressional intention to withdraw Tucker Act jurisdiction to provide such compensation. However, this Court, relying on *Regional Rail*, reversed and found that a suit for compensation in the

Claims Court was not inconsistent with the FIFRA procedures.[5]

B. A Tucker Act Remedy For Breach Is Part Of The Consideration Under Contracts With The Government

The Tucker Act remedy at issue here is one for breach of an express, written contract. Under the *Regional Rail* rationale, there is no inconsistency, much less a "positive repugnancy," between the enforcement of the Department of Energy's price control regulatory system under the ESA and the enforcement of a contract between a private party and the Department of the Interior. Simply put, we know of no decision by this Court where a party was precluded from enforcing a contractual obligation against the United States because a later enacted statute implicitly repealed a Tucker Act remedy for breach of contract.

Both the OCSLA, 43 U.S.C. § 1353(b)(1), and Article V of the crude oil sales contract between petitioner and the Department of the Interior require crude oil to be sold by Interior "for not more than its regulated price . . . ." Both the statute and the contract go on to state that the term "regulated price" means "the highest price at which oil may be sold pursuant to the Emergency Petroleum Allocation Act of 1973

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5 In Hatzlachh Supply Co. v. United States, 444 U.S. 460 (1980), the Court ruled that a statutory exemption from tort liability for claims arising from the detention of merchandise by customs officers does not preclude a Tucker Act suit for breach of an implied-in-fact contract of bailment. The court reasoned that in enacting the exemption from tort liability, Congress expressed no intent to disturb existing Tucker Act remedies. *See also* Block v. Neal, 460 U.S. 289, 298 (1983).

. . . and any rule or order issued under such act." The incorporation of the OCSLA into the contract verbatim accomplished two things. First, Interior was reassuring petitioner that it would obey the law - something it was obligated to do anyway. Thus, because the government is presumed to intend to obey the law, Article V would be redundant or meaningless unless it meant something more. We submit it did mean more -- it promised a Tucker Act remedy.

This is evident when viewed in the context of the state of the law at the time the contract was written. The contract was signed in 1980, four years after this Court's decision in *United States v. Testan*, 424 U.S. 392 (1976), which announced very stringent criteria for determining when a statute would give rise to a damage action against the government. Two years after the *Testan* decision, the OCSLA amendments of 1978 were enacted. The contract incorporating the OCSLA amendments was entered into two years after that.[6] Thus, the contract was written with the knowledge that the state of the law strongly disfavored interpreting statutes as providing damage remedies against the United States. The act of putting a statutory duty into a contract, however, ensured that a damage action could be maintained against the United States because breach of the duty was breach of a contract. There is no question but that the Tucker Act provides both the waiver of sovereign immunity and the source of substantive law mandating compensation in cases involving breach of contract:

> The existence of a waiver is readily apparent

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6 United States v. Mitchell, 463 U.S. 206 (1983), which clarified the *Testan* rule, was not decided until three years after the contract had been signed.

> in claims founded upon "any express or implied contract with the United States." . . . The Court of Claims' jurisdiction over contract claims against the Government has long been recognized, and Government liability in contract is viewed as perhaps "the widest and most unequivocal waiver of federal immunity from suit."

United States v. Mitchell, 463 U.S. 206, 215 (1983) (citations omitted).

Thus, the effect of incorporating the OCSLA obligation into the contract was a promise by the government to afford a Tucker Act remedy for breach of that obligation. And, as we have demonstrated above, this remedy has not been repealed, either explicitly or by implication, by any other statute.

C. This Action Does Not "Arise Under" The ESA, Or The EPAA.

The lower court premised its ruling on the assumption that this action is not really one for breach of contract, but rather, is a case that "arises under" the ESA and the EPAA. This is a key assumption because if the case did not "arise under" the ESA or the EPAA, those statutes could not be interpreted as repealing petitioner's Tucker Act remedy.

The court below based its assumption on the fact that issues relating to the DOE price control regulations would have to be resolved in order to resolve petitioner's action for breach of contract:

> Absent the central issues of the alleged violations of ESA, EPAA and DOE implementing regulations, no claim would exist for breach of contract . . . . Clearly the statutory claims dominate the Tucker Act issues. The claims in plaintiffs' complaints that are based on sales transactions that occurred before January 28, 1981 [decontrol], arise under the DOE pricing regulations.

(App. at 10a). The court's assumption is patently wrong and is inconsistent with this Court's ruling in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 106 S. Ct. 3229 (1986).

In *Merrell Dow*, this Court reviewed the propriety of removing to federal court a state court action against a drug manufacturer that was based in part on the theory that the defendant's alleged violation of the federal Food, Drug and Cosmetic Act constituted negligence. There is no private right of action under that federal statute. The Court ruled that removal was improper because the case did not "arise under" federal law:

> [A] complaint alleging a violation of the federal statute as an element of the state cause of action when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim "arising under the Constitution, laws or treaties of the United States." 28 U.S.C. § 1331.

106 S. Ct. at 3237. The situation in the instant case is identical. According to the Temporary Emergency Court of

Appeals, Congress has determined that there is no private federal cause of action for violation of the ESA or EPAA by an agency of the United States. *Transamerican Natural Gas Corp. v. United States Dep't of Interior*, 816 F.2d 689 (TECA), *cert. denied*, 108 S.Ct. 198 (1987); *Lunday-Thagard Co. v. United States Dep't of Interior*, 773 F.2d 322 (TECA 1985), *cert. denied*, 474 U.S. 1055 (1986). Consequently, in view of TECA's rulings, petitioner could not be stating a claim "arising under" either the ESA or the EPAA.

Moreover, the fact that the Claims Court may be called upon to decide issues relating to the EPAA simply does not mean that the case "arises under" the EPAA. In *Merrell Dow*, for example, the fact that the trial court might have been required to determine whether the Food, Drug and Cosmetic Act had been violated in order to determine whether the defendant drug manufacturer was negligent simply did not mean that the case was one "arising under" federal law.

Similarly, Section 211 of the ESA, which grants district courts exclusive jurisdiction to consider cases arising under the EPAA regulations, expressly provides that "any court of competent jurisdiction [may] consider, hear, and determine any issue by way of defense . . . raised in any proceeding before such court." Thus, if the EPAA regulations are raised as a defense to a state court action for breach of a crude oil sales contract, the action remains in state court. Obviously, the state court would be required to interpret and apply the regulations in such an action. Nevertheless, a state court contract action remains a state court contract action -- not one "arising under" the EPAA.

Moreover, the use of the term "regulated price" as a benchmark to establish the price of oil, is the same as using such benchmarks as "the highest posted price in the field" or the "price established by Platt's Oilgram Bunkerwire Mid-point." Indeed, the Natural Gas Policy Act ("NGPA") price is often used as the benchmark price in natural gas sales contracts. While federal courts have exclusive jurisdiction to enforce the NGPA, state courts are often called upon to resolve contract disputes involving application of the NGPA. Moreover, it is well settled that the presence of the NGPA issue is not sufficient to invoke the federal question jurisdiction of the federal courts under 28 U.S.C. § 1331. A simple action for breach of contract thus remains an action for breach of contract under state law, not one "arising under" the NGPA, even though an element of the breach of contract action involves allegations and proof that a federal statute has been violated. *Superior Oil Co. v. Pioneer Corp.*, 706 F.2d 603, 607 (5th Cir. 1983), *cert. denied*, 464 U.S. 1041 (1984).

Moreover, the Claims Court has had jurisdiction to decide so-called EPAA issues for the last several years. Large portions of the EPAA were incorporated into the Crude Oil Windfall Profit Tax Act, 26 U.S.C. § 4986 *et seq.* Many of the terms and concepts used in determining tax liability were taken verbatim from the regulations promulgated pursuant to the EPAA. Indeed, the term "energy regulations," which is used throughout the Act, is defined to mean "regulations prescribed under Section 4(a) of the Emergency Petroleum Allocation Act of 1973 . . . ." 26 U.S.C. § 4996(b)(a)(A). The Claims Court has jurisdiction over cases seeking refund of taxes erroneously paid -- including windfall profit taxes. *See* H.R. Conf. Rep. No. 817, 96th Cong., 2d Sess. 115, *reprinted in* 1980 U.S. Code Cong. &

Admin. News 642, 668. The fact that the Claims Court will have to decide EPAA issues in a windfall profit tax case certainly does not convert such a case into one that "arises under" the EPAA.

This Court has long recognized that the issues to be decided in a case are not determinative of jurisdiction. In *Hatzlachh Supply Co. v. United States*, 444 U.S. 460 (1980), for example, this Court ruled that an exemption in the Federal Tort Claims Act for claims arising from the detention of merchandise by Customs officers did not preclude a Tucker Act suit for breach of an implied in-fact contract of bailment. Thus, the fact that the issues to be decided in the contract action are identical to those that would have to be decided in an action under the Federal Tort Claims Act -- an action that was barred -- did not preclude Tucker Act jurisdiction for breach of contract. *See also Block v. Neal*, 460 U.S. 289, 298 (1983); *United States v. Bostwick*, 94 U.S. 53 (1877). Indeed, in *Regional Rail*, Justice Douglas based his dissent, in part, on the ground that the Court of Claims would have to decide issues within the exclusive jurisdiction of the Special Court in order to resolve the Tucker Act dispute. Seven Justices of this Court, however, did not share Justice Douglas' concerns.

Finally, last term in *United States v. Hohri*, 107 S. Ct. 2246 (1987), the Court was confronted with the question of appellate jurisdiction over a case raising claims under the Little Tucker Act, 28 U.S.C. § 1346(a)(2), and the Federal Tort Claims Act, 28 U.S.C. § 1346(b). The Federal Circuit has exclusive appellate jurisdiction over appeals from actions brought under the Little Tucker Act, but no jurisdiction over cases brought under the Federal Tort Claims Act. This Court ruled that the presence of tort claims, and the consequent need to resolve tort issues, did not convert the case from a

Tucker Act case to one arising under the Federal Tort Claims Act. Similarly, the possible need to resolve EPAA issues is not sufficient to convert the instant case from an action for breach of contract under the Tucker Act to one "arising under" the EPAA.

D. The Ruling In This Case Results In A Wrong Without A Remedy

The Temporary Emergency Court of Appeals has twice ruled that an action against the government, in district court, for violation of the ESA or EPAA is barred by sovereign immunity. The Federal Circuit has ruled that petitioner has no Tucker Act remedy for breach of contract because the case arises under the ESA and EPAA. Thus, in spite of the fact that Congress, in enacting OSCLA, required Interior to comply with the EPAA pricing regulations, and in spite of the fact that Interior made a contractual promise to comply with those regulations, the net result of the ruling below is that no forum exists to enforce either the statutory obligation or the contractual promise. It is inconceivable that Congress intended this result, or dreamed that the courts would construe the applicable statutes to produce this result. The Temporary Emergency Court of Appeals stated itself that this situation "presents a claim of injury which on its face appears to call for a remedy," *Lunday-Thagard Co. v. United States Dep't of Interior*, 773 F.2d 322, 326 (TECA 1985), *cert. denied*, 474 U.S. 1055 (1986). We submit that the Tucker Act provides such a remedy. If the ruling below stands, however, it will mean that Interior is free to violate both a statutory directive and a contractual obligation with impunity, and that certain otherwise valid contracts with the government are unenforceable. We submit that this is not only

inequitable, it is fundamentally inconsistent with the purpose of the Tucker Act, which was to "give the people of the United States what every civilized nation of the world has already done - the right to go to court to seek redress against the Government for their grievances." *United States v. Mitchell*, 463 U.S. at 213-14.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: February 16, 1988

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1233

TIPPERARY REFINING COMPANY,
Plaintiff-Appellant,
v.

THE UNITED STATES,
Defendant-Appellee.

87-1234

DEMENNO/KERDOON,
Plaintiff-Appellant,
v.

THE UNITED STATES,
Defendant-Appellee.

Appealed from U.S. Claims Court

Judge Harkins

Decided November 17, 1987

Daniel Joseph, Akin, Gump, Strauss, Hauer & Feld, of Washington, D.C., argued for plaintiff-appellant, Tip-

perary. *David A. Donohoe*, P.C., *Jerry E. Rothrock*, *Harry R. Silver* and *John M. Cook*, of Akin, Gump, Strauss, Hauer & Feld, of Washington, D.C., were on the brief for plaintiff-appellant, Tipperary.

Richard H. Streeter, Barnes & Thornburg, of Washington, D.C., argued for plaintiff-appellant, Domenno Kerdoon.

Dina R. Lassow, Department of Justice, of Washington, D.C., argued for defendant-appellee. With her on the brief were *Richard K. Willard*, Assistant Attorney General, *Dennis G. Linder* and *Stephen E. Hart*.

Before DAVIS, *Circuit Judge*, SKELTON, *Senior Circuit Judge*, and NEWMAN, *Circuit Judge*.

PER CURIAM.

Appellants are two small business oil refiners each of which entered into contracts with the Department of the Interior to purchase Government royalty oil. Such sales and purchases of Government royalty oil were subject to federal regulations from 1973 to January 28, 1981. Both companies filed suit in the Claims Court under the Tucker Act (28 U.S.C. § 1491(a)(1)) to recover for allegedly excessive prices collected by the Government contrary to that federal regulatory scheme. The Government moved to dismiss on the ground that there was no jurisdiction in the Claims Court to consider such claims. Judge Harkins of the Claims Court held that there was no such jurisdiction, and therefore dismissed the complaints. *Tipperary Refining Co. v. United States*, 11 Cl. Ct. 572 (1987). We agree with his views and affirm on the basis of that opinion.

AFFIRMED.

UNITED STATES CLAIMS COURT

Nos. 283-86C, 299-86C

Jan. 23, 1987

TIPPERARY REFINING CO.

v.

THE UNITED STATES

DEMENNO/KERDOON

v.

THE UNITED STATES

Harry R. Silver, Washington, D.C., attorney of record for plaintiff in No. 283-86C. David A. Donohoe, Jerry E. Rothrock, and Akin, Gump, Strauss, Hauer & Feld, of counsel.

Dina R. Lassow, Washington, D.C., with whom was Asst. Atty. Gen. Richard K. Willard, for defendant. Peter J. Schaumberg and Geoffrey Heath, Dept. of Interior, of counsel.

Richard H. Streeter, Washington, D.C., attorney of record for plaintiff in No. 299-86C. Wheeler & Wheeler, of counsel.

MEMORANDUM OF DECISION

HARKINS, Senior Judge:

These cases come before the court on defendant's motions to dismiss for lack of jurisdiction over the subject matter or for failure to state a claim for which relief can be granted. Oral argument was heard on both cases on January 21, 1987. For the reasons stated below, the complaints are to be dismissed.

Plaintiffs are small business refiners whose only source of crude oil is that obtained from other sources. These cases are concerned with plaintiffs' contracts to purchase Government royalty oil from the United States Geological Survey (USGS), a part of the Department of Interior (DOI). Tipperary Refining Co., plaintiffs in case No. 283-86C, on June 5, 1980, entered an agreement for the sale and purchase of Government royalty oil pursuant to the Outer Continental Shelf Lands Act of 1953 (OCSLA). 43 U.C.S. §§ 1331 et seq. (1982). DeMenno/Kerdoon, plaintiff in case No. 299-86C, on June 3, 1980, entered an agreement for the sale and purchase of Government royalty oil pursuant to the OCSLA. The two contracts under the OCSLA are referred to as offshore contracts; each had 3-year terms, from July 1, 1980, to July 1, 1983. The offshore contracts were on standard DOI forms, and the terms relevant to plaintiffs' claims are identical.

DeMenno/Kerdoon, on June 1, 1980, entered an agreement for the sale and purchase of Government royalty oil pursuant to the Mineral Lands Leasing Act of 1920, as amended, (MLLA). 30 U.S.C. §§ 181 et seq. (1982). This contract was for onshore royalty oil; its term was from June 1, 1980, to June 1, 1983, and it was on a standard DOI form.

In January 1982, the Secretary established the Minerals Management Service (MMS), and transferred responsibility for administering the royalty oil program

from the USGS to MMS. Secretarial Order No. 3071 (Jan. 19, 1982).

In both the MLLA and the OCSLA, Congress required, in substance, that the Secretary realize from sales of royalty oil at least the same amount of money for the Government that it would have if the royalties were taken in value rather than in kind. 30 U.S.C. § 192; 43 U.S.C. § 1334(a)(1) (1976). In 1978, Congress amended the OCSLA to provide that offshore royalty oil could be sold "for not more than its regulated price, or, if no regulated price applies, no less than its fair market value." 43 U.S.C. § 1353(b)(1).

Plaintiffs' contracts were made in DOI's onshore and offshore royalty oil programs. The MLLA and OCSLA authorize the Secretary of the Interior to grant oil and gas leases on federally owned lands and on submerged lands of the Outer Continental Shelf. The Secretary may elect to take royalties accruing to the United States under such leases at the monetary value, or in oil. 30 U.S.C. § 192; 43 U.S.C. § 1353(a)(1). If taken in kind, the royalty oil may be sold to a defined class of small, independent refiners, such as plaintiffs. 30 U.S.C. § 192; 43 U.S.C. § 1353(e)(2).

From August 1973, to January 28, 1981, sales of Government royalty oil were subject to the pricing and allocation controls authorized under the Economic Stabilization Act of 1970, as amended, (ESA) (12 U.S.C. § 1904 note (1982)) and the Emergency Petroleum Allocation Act of 1973, as amended (EPAA) (15 U.S.C. §§ 751 et seq. (1982)). In August 1973, mandatory price controls on the sale of domestic crude oil and petroleum products initially were included in Phase IV of the Economic Stabilization Program by the Cost of Living Council (CLC) pursuant to the ESA.

The EPAA, signed November 27, 1973, directed the President to implement a mandatory petroleum allocation

program to minimize dislocations in the distribution of petroleum products, to meet priority needs, and to reduce the impact of such shortages on the American people and the domestic economy. Section 4(a) of the EPAA (15 U.S.C. § 753(a)) required the President to promulgate regulations providing for the mandatory pricing and allocation of crude oil. To carry out the policy goals of the EPAA, the President established the Federal Energy Office (FEO) which, in January 1974, issued Mandatory Petroleum Allocation and Price Regulations. On the pricing side, the FEO's regulations carried forward the CLC's regulations. 39 Fed.Reg. 1924 (Jan. 15, 1974). Responsibility for the regulation of petroleum pricing and allocation under the EPAA subsequently was transferred to the Federal Energy Administration, and to the Department of Energy. Department of Energy Organization Act, 42 U.S.C. §§ 7101 et seq. (1982).

Section 5(a)(1) of the EPAA incorporates by reference the regulatory scheme of the ESA, including the comprehensive system of judicial review provided through section 211 of the ESA. 15 U.S.C. § 754(a)(1). Section 211(a) in pertinent part provides:

> (a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy.

Section 211(b) in pertinent part provides:

> (b)(1) There is hereby created a court of the United States to be known as the Temporary Emergency Court of Appeals, which shall consist of three or more judges to be designed by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. . . .

(2) Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court.

All regulatory controls on prices were removed on January 28, 1981, by Executive Order No. 12287, 46 Fed.Reg. 9909 (Jan. 30, 1981).

Tipperary's complaint, filed May 6, 1986, invokes the Tucker Act jurisdiction of this court (28 U.S.C. § 149 (a)(1) (1982)) and alleges defendant breached its offshore contract, unlawfully exacted money belonging to plaintiff, and took plaintiff's money without just compensation in violation of the 5th Amendment. DeMenno/Kerdoon's complaint, filed May 13, 1986, invokes the Tucker Act jurisdiction. The complaint alleges defendant breached the offshore and onshore contracts as a result of DOI's refusal to comply with the EPAA, DOE's regulations, and 1978 OCSLA amendments; that defendant unlawfully exacted money belonging to plaintiff as a result of DOI's breaches of its contracts, and that defendant took DeMenno/Kerdoon's property in violation of the 5th Amendment by charging prices for crude oil in excess of those permitted in the contracts. Both plaintiffs contend the complaints spell out the types of claims recognized in the Tucker Act: (1) breach of contract, (2) violation of federal statutes and regulations, (3) unlawful exaction of monies, and (4) 5th Amendment takings of property. Tipperary seeks damages of at least $2 million on its claims, and DeMenno/Kerdoon seeks damages on all claims in both contracts of at least $3 million.

Prior to filing their complaints in this court, plaintiffs had attempted to recover for alleged violations of DOE price regulations through procedures under the EPAA. Tipperary on December 30, 1983, brought an action against DOI in the District Court of the Western District of Texas (Civil Action No. MO-84-CA-5) under ESA § 210 alleging that DOI had violated the EPAA price regulations and had breached the contract. ESA § 210 authorized any person suffering a legal wrong because of any act arising out of the price control regulations to bring a district court action to recover up to treble damages, on the lapse of 90 days after a bonafide claim for a refund of the overcharge had been presented to the seller. Prior to the suit in Texas, Tipperary had demanded from DOI approximately $2.8 million in alleged overcharges. DeMenno/Kerdoon on February 19, 1986, sent a demand letter under ESA § 210 to DOI to recover for alleged overcharges under the onshore contract of $379,746.78 during the period June 1980 through January 1981. On March 17, 1986, DeMenno/Kerdoon sent a similar demand letter, citing OCSLA (43 U.S.C. § 1353(b)(1)), for overcharges under the offshore contract of $2,544,290.86 during the period July 1980 through January 1981. The demands in both letters were supplemented by a letter to DOI on April 2, 1986.

Plaintiffs' efforts to bring an action for statutory overcharges under ESA § 210 were thwarted by a decision of the Temporary Emergency Court of Appeals (TECA) in another case brought by counsel for Tipperary. *Lunday-Thagard Co. v. DOI*, 773 F.2d (TECA 1985), *cert. denied*, —— U.S.——, 106 S.Ct. 972, 88 L.Ed.2d 770 (1986). TECA ruled in *Lunday-Thagard* that ESA § 210 did not contain a waiver of sovereign immunity, that the United States did not come within the definition of a "person", that the section did not provide the independent refiner with a cause of action for damages against the United States, and that breach of contract

claims going to violations of the EPAA are cognizable only as statutory claims. The contracts in *Lunday-Thagard* covered both offshore and onshore royalty oil, and included deliveries both during the regulatory period that ended January 28, 1981, and after that date. The TECA found that the claim for damages rested on alleged violations of the EPAA and the regulations implementing it, except for a relatively small claim seeking reimbursement for transportation payments, which was seen as a Tucker Act claim independent of any claim created by the EPAA. TECA affirmed the dismissal of the breach of contract claims that alleged violations of DOE price regulations, and remanded for resolution the Tucker Act issue of damages for transportation payments.

As a result of the *Lunday-Thagard* decision, the District Court for the Northern District of Texas on October 9, 1985, dismissed Tipperary's breach of contract claims going to violations of the EPAA. After further briefing on the breach of contract claim for transportation payments, the District Court on April 14, 1986, on Tipperary's suggestion, found that the claims for transportation payments exceeded $10,000, that the court lacked subject matter jurisdiction, and dismissed without prejudice.

The complaints in these cases are drafted specifically to invoke the elements of this court's Tucker Act jurisdiction: claims founded upon (1) the Constitution, or (2) upon any statute or regulation, or (3) any express contract, or (4) liquidated or unliquidated damages in cases not sounding in tort. The complaints and motion papers make it clear that plaintiffs primarily are concerned with breaches of the offshore and onshore contracts that allegedly occurred before January 28, 1981, during the period crude oil prices were regulated. The statutes and regulations involved in the alleged breach of those contracts during the regulation period are the ESA, the EPAA, and the DOE pricing regulations prom-

ulgated thereunder. The 5th Amendment takings, during the regulation period concern property, in the form of money or claims, that would come into existence on proof of violations of the pricing regulations. The claims for monies illegally exacted, during the period before January 28, 1981, similarly, are based on breach of the contract provisions that call for payments at the regulated price.

In summary, the core of each of the claims under the Tucker Act presented in plaintiffs' complaints that arise during the period of regulation is a violation of the pricing regulations. Absent the central issues of the alleged violations of ESA, EPAA and DOE implementing regulations, no claim would exist for breach of contract, violation of statute or regulation, illegal exaction, or 5th Amendment taking. Clearly the statutory claims dominate the Tucker Act issues. The claims in plaintiffs' complaints that are based on sales transactions that occurred before January 28, 1981, arise under the DOE pricing regulations.

Plaintiffs argue that the jurisdiction over contract claims conferred in the Tucker Act exists concurrently with the statutory remedies and judicial review procedures established in the ESA and the EPAA. Accordingly, plaintiffs would have this court proceed under the Tucker Act and determine whether DOI's actions prior to January 28, 1981, constituted a breach of the provision in Article V of the offshore contracts that the Government agrees to accept and the Purchaser agrees to pay for royalty oil "at the regulated price." Plaintiffs do not give effect to the system of judicial review Congress created in the ESA and make applicable in the EPAA. Nor do plaintiffs recognize the precedent, binding on this court, of the Court of Claims as to these issues.

In its enactment of ESA 211, with respect to the claims identified in that section, Congress withdrew the

jurisdiction this court otherwise would have had under the Tucker Act. Court of Claims precedent requires this conclusion. The Court of Claims found that the text of ESA § 211(a) blanketed the court so that it could not scrutinize the merits of a civilian pay claim under the Back Pay Act (5 U.S.C. § 5596 (1982)) where the plaintiff challenged an order which rested on the ESA and the policies and guidelines of the Cost of Living Council and the Office of Emergency Preparedness. *Metsch v. United States*, 493 F.2d 1232, 204 Ct.Cl. 35 (1974). Similarly, the Court of Claims found that ESA § 211 was effective to oust it of jurisdiction to hear a claim for alleged illegal exaction of money by the Cost of Living Council as a penalty for increasing plaintiff's profit margin for custom services contrary to the ESA. *The Poole & Kent Co. v. United States*, 566 F.2d 1189, 214 Ct.Cl. 836 (1977).

These Court of Claims precedents are persuasive. No reason or logic justifies a different treatment for plaintiffs' breach of contract claims from the treatment that was accorded by the Court of Claims with respect to civilian pay claims and claims for illegal exactions that, but for ESA § 211, could have been heard under the Tucker Act jurisdiction.

Plaintiffs argue that the ESA § 211 procedure does not apply to their claims because the rules of statutory construction do not permit a subsequently enacted statute to amend or repeal a prior one, in the absence of an express declaration that Congress so intended. Amendment or repeal of Tucker Act remedies is not to be implied. Plaintiffs cite *Regional Rail Reorganization Act Cases v. United States*, 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974) and *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984). When the former statute cannot be reconciled with the later enacted statute, however, and the two are not capable of coexistence, the intent of Congress to withdraw jurisdic-

tion previously granted must be recognized. *Regional Rail Reorganization Act Cases v. United States*, 419 U.S. at 134, 95 S.Ct. at 353; *Ruckelshaus v. Monsanto Co.*, 467 U.S. at 1018, 104 S.Ct. at 2875.

In ESA § 211(a), Congress explicitly stated that the district courts shall have "exclusive original jurisdiction" of cases arising under the ESA. That regulatory scheme has been incorporated in EPAA and DOE pricing regulations. Although the Tucker Act is not specifically restricted in ESA § 211(a) or mentioned in its legislative history, the grant of "exclusive" jurisdiction to one court necessarily means withdrawal of jurisdiction from all other courts, including this court. The two jurisdictions cannot exist together. The special judicial procedure created for review of the regulatory scheme included all of the remedies that otherwise would be available under the Tucker Act for claims arising under the Constitution, statutes, regulations, contracts, or illegal exactions. Accordingly, incorporation of ESA § 211 in the EPAA withdrew the jurisdiction of this court over plaintiffs' claims for breach of contract, violation of statutes and regulations, illegal exactions, and 5th Amendment takings that allegedly occurred during the regulation period and which arose from regulations duly promulgated by DOE.

In both the offshore and onshore contracts, the performance period included time after January 28, 1981, during which EPAA regulations were not applicable. During that later time, the Tucker Act jurisdiction of this court was not affected. The complaints in plaintiffs' cases for this period do not identify actions that allegedly would constitute a breach of contract. The briefing papers and argument, however, make it clear that plaintiffs' claims are concerned with prices charged during the period of regulation. Material relative to amounts of royalty oil purchased during the nonregulatory period is not presented, nor is pricing data. The amounts plaintiffs claim as damages in their complaints, and at argument,

are computed on the basis of transactions that occurred during the period of price regulation.

Article XI of the offshore contracts and Article X of the onshore contract provide procedures to resolve disputes. At argument, plaintiffs acknowledged that no efforts had been made to utilize these procedures as to DOI actions applicable to prices for sales made during the period after January 28, 1981. The disputes procedures provided in Articles XI and X are not models of clarity, nor do they embody the procedures normally found in the standard disputes clause. DOI regulations, however, provide a right of appeal from a final order of the MMS Supervisor and an appeal to the Interior Board of Land Appeals (IBLA). 30 C.F.R. §§ 290.1-290.7 (1980).

Plaintiffs' complaints do not allege compliance with DOI's disputes procedures applicable to these contracts. In fact, plaintiffs did not attempt to pursue an administrative remedy for disputes that arose from sales transactions that occurred after price control regulations expired. Plaintiffs assert their complaints state claims for breach of contract, that the claims do not "arise under the contract", and, accordingly, that pursuit of an administrative remedy is not necessary. Further, plaintiffs argue that any attempt at an administrative remedy would be fruitless. It is clear that the sales transactions that occurred in the post regulation period would involve numerous factual issues that would require resolution by the IBLA before any breach of contract issue could be determined.

There is no excuse for plaintiffs' failure to pursue the administrative remedy that was available. Plaintiffs' failure to exhaust the administrative remedies available precludes judicial review at this time of plaintiffs' Tucker Act claims that are based on prices DOI found to be due in sales of royalty oil during the period after regulation. *Richardson Camera Co. v. United States*, 467 F.2d 491, 495-96, 199 Ct.Cl. 657 (1972).

Defendant's motions to dismiss for lack of jurisdiction over the subject matter are ALLOWED as to plaintiffs' claims that arose from transactions that occurred during the period prior to January 28, 1981. Plaintiffs have failed to exhaust their administrative remedies as to claims that arise from sales transactions that occurred after January 28, 1981, during the terms of the contracts. Accordingly, the Clerk is directed to dismiss the complaint of Tipperary Refining Co., docket No. 283-86C, and the complaint of DeMenno/Kerdoon, docket No. 299-86C.

IN THE UNITED STATES CLAIMS COURT

No. 283-86 C

TIPPERARY REFINING COMPANY

v.

THE UNITED STATES

JUDGMENT

Pursuant to the memorandum of decision filed January 23, 1987, directing dismissal of the complaint.

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed, with costs to the prevailing party.

FRANK T. PEARTREE
Clerk of Court

By: /s/ Linda A. Eddins
Deputy Clerk

January 27, 1987

NOTE: As to appeal, 60 days from this date, see FRAP 4(a).

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1233

TIPPERARY REFINING COMPANY,
Plaintiff-Appellant,
v.

THE UNITED STATES,
Defendant-Appellee.

87-1234

DEMENNO/KERDOON,
Plaintiff-Appellant,
v.

THE UNITED STATES,
Defendant-Appellee.

JUDGMENT

On appeal from the United States Claims Court in case No(s). 283-86 C & 299-86 C

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

AFFIRMED.

ENTERED BY
ORDER OF THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated Nov. 17, 1987

Issued as a mandate: December 8, 1987
Costs: Against, Appellants

Printing	$460.08
Total	$460.08

(3) (2)

Nos. 87-1359 and 87-1380

In the Supreme Court of the United States

OCTOBER TERM, 1987

DEMENNO/KERDOON, PETITIONER

v.

UNITED STATES OF AMERICA

TIPPERARY REFINING CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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20 pp

QUESTION PRESENTED

Whether the Claims Court had jurisdiction under the Tucker Act, 28 U.S.C. 1491, over claims, ostensibly involving breach of contract, that are based on alleged violations of price control regulations issued pursuant to the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1359

DEMENNO/KERDOON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 87-1380

TIPPERARY REFINING CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2[1]) is reported at 833 F.2d 301. The opinion of the Claims Court (Pet. App. A3-A29) is reported at 11 Cl. Ct. 572.

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[1] References to the appendix to the petition are to the appendix in No. 87-1359.

JURISDICTION

The judgment of the court of appeals (Pet. App. A30) was entered on November 17, 1987. The petition in No. 87-1359 was filed on February 13, 1988. The petition in No. 87-1380 was filed on February 16, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Department of the Interior (DOI) grants oil and gas leases on federally owned lands and offshore properties under the Mineral Lands Leasing Act of 1920, 30 U.S.C. (& Supp. III) 181 *et seq.*, and the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. (& Supp. III) 1331 *et seq.* The government retains a royalty interest in these leases, and the Secretary of the Interior is authorized to take royalties in money or in kind. If the Secretary elects to accept royalties in kind, the royalty oil may thereafter be sold to small independent refiners; if the Secretary makes any such sale, he must realize at least the same amount of money that the United States would have obtained if the royalties had originally been taken in cash. 30 U.S.C. 192; 43 U.S.C. 1353.

Petitioners are small refiners of crude oil. In 1980, DeMenno/Kerdoon, petitioner in No. 87-1359, entered into two contracts with the United States, through the United States Geological Survey, a sub-agency of DOI, to purchase royalty oil. One contract involved onshore oil, while the other covered offshore oil. Tipperary Refining Company (Tipperary), petitioner in No. 87-1380, entered into a contract with DOI for the purchase of royalty oil from offshore tracts in 1980. Pet. App. A5-A6.[2] Until

[2] Both contracts for offshore royalty oil provided that the price would be "the regulated price or, if no regulated price applies, * * * the fair market value price" (see 87-1380 Complaint Exh. A at A3;

January 28, 1981, maximum prices for different categories or "tiers" of crude oil were set by the Department of Energy (DOE) under the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. 754(a)(1), and the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. (1976 ed.) 1904 note. During the time DOE price controls were in effect, producers were required to certify to their purchasers the volumes of oil purchased in each tier within a specified time. See, *e.g.*, 39 Fed. Reg. 1924 (1974); 41 Fed. Reg. 4931 (1976). The President terminated regulation of petroleum pricing on January 28, 1981. Exec. Order No. 12,287, 3 C.F.R. 124 (1982).

2. a. In January 1984 petitioner Tipperary filed an action against DOI in the United States District Court for the Western District of Texas. That suit was brought under Section 210 of the ESA, 12 U.S.C. (1976 ed.) 1904 note, which "authorized any person suffering a legal wrong because of any act arising out of the price control regulations to bring a district court action to recover up to treble damages" (Pet. App. A14).[3] Tipperary alleged that

87-1359 Complaint Attach. at A3). The "regulated price" was defined as "the highest price (a) at which oil may be sold pursuant to the Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. 751 *et seq.*, and any rule or order issued under such Act, or (b) at which Federal oil may be sold under any provision of law or rule or order thereunder which sets a price (or manner for determining a price) for oil." *Ibid.* DeMenno/Kerdoon's contract for onshore oil provided that DeMenno/Kerdoon would pay the market price and did not mention the regulated price (87-1359 Complaint Attach. at B2). In addition, all three contracts provided that they would be "subject to all war or emergency laws of Congress now or hereafter enacted and to all valid orders, rules, and regulations issued pursuant to such laws" (see *id.* at A8, B5; 87-1380 Complaint Exh. A at A8).

[3] Federal court jurisdiction under both the ESA and the EPAA is governed by Sections 210 and 211 of the ESA, 12 U.S.C. (1976 ed.) 1904 note (see 15 U.S.C. 754(a)(1) (EPAA and regulations thereunder

DOI had violated the EPAA regulations by imposing improper surcharges and by failing timely to certify the "tier" under which the price of the royalty oil sold to Tipperary was to be calculated. The complaint did not allege that if DOI's certifications had been timely Tipperary would have paid a lower price for the oil.[4] See 87-1380 Defendant's Mot. to Dis. App. 26-28. Tipperary also claimed that the violations of the EPAA regulations constituted breaches of its contract with DOI because of the provision subjecting the contract to all emergency laws of Congress. See *id.* at 28.

While Tipperary's action was pending in the district court, the Temporary Emergency Court of Appeals (TECA) decided *Lunday-Thagard Co.* v. *United States Dep't of Interior*, 773 F.2d 322 (1985), cert. denied, 474 U.S. 1055 (1986). In *Lunday-Thagard*, TECA held that sovereign immunity bars suits against the government under Section 210 of the ESA, including actions for breach of contract based on violations of the ESA or the EPAA. Accordingly, the district court, on October 9, 1985, dismissed Tipperary's action under Section 210 of the ESA, including its breach of contract claim based on violations of the EPAA, on the authority of *Lunday-Thagard* (Pet. App. A16-A17).[5]

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to be treated like ESA and its regulations for jurisdictional purposes)). Under Section 211(a) of the ESA, the federal district courts have "exclusive original jurisdiction of cases or controversies arising under" the ESA, and therefore the EPAA. Jurisdiction over appeals arising under the ESA or the EPAA is exclusively in the Temporary Emergency Court of Appeals (TECA) under Section 211(b) of the ESA.

[4] Of the roughly $2.672 million Tipperary sought in damages, some $2.617 million derived from the claim based on allegedly improper certifications. 87-1380 Defendant's Mot. to Dis. App. 28, 29.

[5] Tipperary had also alleged that DOI violated the contract by failing to reimburse it for transportation of the royalty oil away from the offshore platforms where it was collected, a claim which on its face appeared to be independent of the EPAA. The district court found

Tipperary thereafter brought this suit in the Claims Court on May 6, 1986. Tipperary alleged that DOI had breached the oil sale contract, that DOI had unlawfully exacted money from Tipperary, and that DOI had taken Tipperary's property without just compensation in violation of the Fifth Amendment. The complaint did not mention the EPAA or the DOE price regulations which had been the basis of Tipperary's action in the district court, although it sought approximately the same amount of damages. Moreover, the complaint did not state that Tipperary had exhausted its administrative remedies for the alleged breach (see 30 C.F.R. Pt. 290; 43 C.F.R. Pt. 4), or that Tipperary had followed the procedures set out in the Contract Disputes Act, 41 U.S.C. (& Supp. III) 601 *et seq.* See 87-1380 Complaint 2-6; see also Pet. App. A26.

b. Petitioner DeMenno/Kerdoon filed suit in the United States Claims Court on May 13, 1986. Like Tipperary, DeMenno/Kerdoon claimed that DOI had breached its contracts, that DOI had unlawfully exacted money, and that DOI had taken DeMenno/Kerdoon's property without just compensation. See 87-1359 Complaint 4-6.[6] The complaint did not allege that DeMenno/Kerdoon had pursued its administrative remedies under DOI regulations or its remedies under the Contract Disputes Act.

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that the amount of that claim exceeded $10,000 and therefore dismissed it without prejudice under the Tucker Act. Pet. App. A17.

[6] Prior to bringing this suit, DeMenno/Kerdoon, in letters to DOI, had alleged overcharges arising from violations of the EPAA regulations of roughly the amounts sought in this case. The vast bulk of those overcharges resulted from allegedly untimely certifications of the type complained of by Tipperary. DeMenno/Kerdoon, like Tipperary, did not suggest that it would have paid a lower price had the certifications been timely. See Pet. App. A14-A15; 87-1359 Defendant's Mot. to Dis. App. 2-18.

3. The Claims Court dismissed both complaints for lack of jurisdiction. While it recognized (Pet. App. A17-A18) that the complaints had been drafted specifically to invoke its Tucker Act jurisdiction, the Claims Court found that "the core of each of the claims under the Tucker Act * * * is a violation of the pricing regulations. Absent the central issue of the alleged violations of the ESA, EPAA and DOE implementing regulations, no claim would exist for breach of contract, violation of statute or regulation, illegal exaction, or 5th Amendment taking." *Id.* at A19.

The Claims Court then explained (Pet. App. A24) that Congress' grant of exclusive jurisdiction to the district courts in Section 211 of the ESA "necessarily means withdrawal of jurisdiction from all other courts, including this court." Accordingly, the Claims Court dismissed "plaintiffs' claims that arose from transactions that occurred during the period prior to [the termination of price regulation under the EPAA]" (Pet. App. A28). The Claims Court also dismissed any claims petitioners may have had that arose out of transactions occurring after decontrol, finding with respect to the post-decontrol claims that petitioners had failed to exhaust their administrative remedies (*id.* at A27-A28).

The Federal Circuit affirmed the Claims Court's decision in a brief per curiam opinion that relied on the lower court's reasoning. Pet. App. A1-A2.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The lower courts properly relied on two fundamental and well-established principles of jurisdiction under the

ESA (and hence the EPAA). The first is that any claim that calls for an interpretation of the ESA or the EPAA (or regulations thereunder) arises under the ESA and is therefore within the exclusive jurisdiction of the district courts under Section 211 of the ESA. See, *e.g., Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp.,* 591 F.2d 711, 716 (Temp. Emer. Ct. App.), cert. denied, 444 U.S. 879 (1979); *Mountain Fuel Supply Co.* v. *Johnson*, 586 F.2d 1375, 1382 (10th Cir. 1978), cert. denied, 441 U.S. 952 (1979); *Mobil Oil Corp.* v. *Tully*, 639 F.2d 912, 915 (2d Cir.), cert. denied, 452 U.S. 967 (1981). The second is that there can be no money recovery against the government on such a claim, unless the government has taken the plaintiff's property without just compensation in violation of the Fifth Amendment. See, *e.g., TransAmerican Natural Gas Corp.* v. *United States Dep't of Interior*, 816 F.2d 689, 691 (Temp. Emer. Ct. App. 1987), cert. denied, No. 86-1712 (Oct. 5, 1987); *Lunday-Thagard Co.* v. *United States Dep't of Interior*, 773 F.2d 322 (Temp. Emer. Ct. App. 1985), cert. denied, 474 U.S. 1055 (1986); *McCulloch Gas Processing Corp.* v. *Canadian Hidrogas Resources, Ltd.,* 577 F.2d 712 (Temp. Emer. Ct. App.), cert. denied, 439 U.S. 831 (1978); *Griffin* v. *United States*, 537 F.2d 1130 (Temp. Emer. Ct. App.), cert. denied, 429 U.S. 919 (1976) (ESA permits suit for unconstitutional taking). Both *Lunday-Thagard* and *TransAmerican* involved alleged violations of the same EPAA certification regulations at issue in this case.

a. Petitioners maintain (87-1359 Pet. 17-34; 87-1380 Pet. 11-15) that Section 211 of the ESA does not displace the Claims Court's Tucker Act jurisdiction (and therefore the Tucker Act's waiver of sovereign immunity), so that if a case comes within one of the categories described by the Tucker Act, the Claims Court has jurisdiction over it even though the case arises under the ESA within the meaning

of Section 211. Section 211(a), however, gives the district courts "exclusive original jurisdiction of cases or controversies arising under [the ESA], or under regulations or orders issued thereunder, notwithstanding the amount in controversy * * *."[7] By its terms, Section 211(a) deprives any court, including the Claims Court, of jurisdiction over cases that arise under the ESA or the EPAA. In *Trans-American*, TECA agreed with the Claims Court's conclusion in this case that there is no Tucker Act jurisdiction over claims that arise under the ESA. TECA therefore refused to transfer to the Claims Court certain ostensibly contract-based claims that involved the interpretation of the EPAA. 816 F.2d at 691-694.

Faced with the language and consistent interpretation of Section 211, petitioners point to cases in which this Court found that Tucker Act jurisdiction had not been withdrawn by other jurisdictional legislation. See 87-1359 Pet. 18-22; 87-1380 Pet. 11-15, citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), and *Ruckelshaus* v. *Monsanto Co.,* 467 U.S. 986 (1984). In those cases, however, the need to avoid possible Takings Clause questions led the Court to hold that any taking effected by the statutes at issue would be compensated in a Tucker Act suit. *Regional Rail Reorganization Act Cases,* 419 U.S. at 134 ("[t]here are clearly grave doubts whether the Rail Act would be constitutional if a Tucker Act remedy were not available"); *Monsanto*, 467 U.S. at 1020 (taking argument not ripe because any taking would be

[7] As DeMenno/Kerdoon notes (87-1359 Pet. 41), Section 211(a) permits any court to decide "any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by an agency under this title) raised in any proceeding before such court." In this case, however, the EPAA issues are central to petitioners' claims and do not enter as part of a defense.

compensated under Tucker Act). Those considerations have no bearing on this case, because claims based on unconstitutional takings may go forward under the ESA and EPAA (see *TransAmerican,* 816 F.2d at 692, citing *Griffin* v. *United States,* 537 F.2d 1130 (Temp. Emer. Ct. App.), cert. denied, 429 U.S. 919 (1976); *McCulloch Gas Processing Corp.* v. *Canadian Hidrogas Resources Ltd.,* 577 F.2d 712, 716-717 (Temp. Emer. Ct. App.), cert. denied, 439 U.S. 831 (1978)).[8]

b. Petitioners also contend that these cases do not arise under the ESA, arguing that the district courts' exclusive ESA jurisdiction extends only to causes of action created by the ESA and that their causes of action sound in contract. They base this argument on what they contend is the normal meaning of the phrase "arising under" in jurisdictional statutes. 87-1359 Pet. 36-45; 87-1380 Pet. 17-22, citing *Merrell Dow Pharmaceuticals, Inc.* v. *Thompson,* No. 85-619 (July 7, 1986).[9] A case arises under the ESA, however, if it "requires application and interpretation of the EPAA" (*Citronelle-Mobile Gathering, Inc.,* 591 F.2d at 716). This principle applies to contract

[8] Although petitioners alleged unconstitutional takings in order to invoke the jurisdiction of the Claims Court (see Pet. App. A17), they do not actually suggest any "taking" other than a breach of contract, and do not seriously argue that there has been any violation of the Fifth Amendment (see *TransAmerican,* 816 F.2d at 693 n.7 (no takings claim based solely on contract overcharges)).

[9] Tipperary errs in implying (87-1380 Pet. 17-19) that under *Merrell Dow* a case arises under federal law for purposes of 28 U.S.C. 1331 *only* if it involves a federally created cause of action. *Merrell Dow* specifically rejected that rule and recognized that jurisdictional issues must be decided through a sensitive inquiry into the meaning and purpose of the relevant statutes (slip op. 4-8). Petitioners are incorrect in suggesting that there is some single, clear meaning that attaches to the words "arising under" whenever Congress uses them.

issues that require interpretation of EPAA regulations. *TransAmerican,* 816 F.2d at 693. The special jurisdiction created by Section 211 of the ESA reflects Congress' desire to ensure that the interpretation of the emergency price control legislation would be swift and uniform (see, *e.g., Citronelle-Mobile Gathering, Inc.,* 591 F.2d at 716). Accordingly, as *Merrell Dow* teaches, the words "arising under" in Section 211 have been construed so as to give effect to the underlying congressional purpose. *Coastal States Marketing, Inc.* v. *New England Petroleum Corp.,* 604 F.2d 179, 182-187 (2d Cir. 1979). Petitioners' suggestion that the exclusive jurisdiction of the district courts extends only to claims that affirmatively rely on the cause of action created in Section 210 of the ESA is therefore incorrect.[10]

Petitioners also suggest (87-1359 Pet. 25-31; 87-1380 Pet. 20-21) that these cases involve, not the interpretation or application of the EPAA, but simply the interpretation of contracts which define their price terms by reference to the price control regulations.[11] TECA (see *TransAmerican,* 816 F.2d at 693) and the Federal Circuit in this case have properly rejected this distinction, under which contracting parties could opt out of the system Congress

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[10] Petitioners are also wrong in suggesting (87-1359 Pet. 31-34; 87-1380 Pet. 17-19) that the courts of appeals have paradoxically held that petitioners' causes of action both arise under the ESA and do not arise under the ESA. These cases arise under the ESA, and are within the exclusive jurisdiction created by Section 211 of the ESA, because they require the application of EPAA regulations. Petitioners are not entitled to any *relief* under the ESA, however, because Congress has not waived sovereign immunity with respect to non-takings claims that come within the exclusive jurisdiction created by Section 211.

[11] Even if this argument is correct, DeMenno/Kerdoon cannot possibly prevail on its contract respecting onshore oil, since that contract does not even refer to the regulated price.

established to ensure swift and uniform interpretation of the price control regulations, simply by agreeing to be bound by the law. Moreover, before it could consider this argument, the Court would first have to reach a question of contract interpretation not addressed below, and decide whether petitioners are correct in claiming that the agreements simply employ the regulations as a benchmark.

2. DeMenno/Kerdoon suggests (87-1359 Pet. 35) that it may obtain a money remedy in the Claims Court for violations of OCSLA, which required that sales of royalty oil to small refiners such as petitioners take place at the regulated price while price controls were in effect (43 U.S.C. 1353(b)(2) and (e)).[12] As this Court explained in *United States* v. *Mitchell,* 463 U.S. 206, 216 (1983), however, "[n]ot every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act." Rather, "the claimant must demonstrate that the source of substantive law he relies upon ' "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." ' " *Id.* at 216-217 (quoting *United States* v. *Testan,* 424 U.S. 392, 400 (1976), quoting *Eastport S.S. Corp.* v. *United States,* 372 F.2d 1002, 1009 (Ct. Cl. 1967)). No provision of OCSLA can fairly be interpreted as mandating compensation by the federal government to petitioners.

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[12] DeMenno/Kerdoon suggests (No. 87-1359 Pet. 46) that the "central purpose" of the 1978 OCSLA amendments was "to require the Government to comply with applicable price regulations in selling oil to small refiners during the regulation period." To the contrary, the principal purpose of the 1978 amendments was to expedite development of the Outer Continental Shelf without jeopardizing the environment. See H. R. Rep. 95-590, 95th Cong., 1st Sess. 53 (1977). We are aware of no mention in the legislative history of Congress' reason for adding the requirement that royalty oil be sold to small refiners at the regulated price

DeMenno/Kerdoon asserts (87-1359 Pet. 35) that OCSLA mandates compensation and alludes to 43 U.S.C. 1339 in support of that proposition by citing *Amoco Production Co.* v. *Hodel,* 815 F.2d 352, 357 n.6, 360 (5th Cir. 1987) (43 U.S.C. 1339 can fairly be interpreted as mandating refunds by federal government to overpaying lessees), petition for cert. pending, No. 87-372; see also *United States* v. *Laughlin,* 249 U.S. 440, 442-443 (1919). Section 1339 does mandate compensation by the federal government in certain cases, but not in the case of DeMenno/Kerdoon. That provision states that lessees of offshore oil and gas leases may obtain refunds for overcharges by DOI. See 815 F.2d at 357 n.6, 360. Petitioners are purchasers of royalty oil, not lessees, and the provision does not apply to them. DeMenno/Kerdoon also points out (87-1359 Pet. 35 n.4) that 43 U.S.C. 1349(a)(1) authorizes "[citizen suits] * * * to compel compliance" with OCSLA. The citizen suit provision, however, refers only to compliance and does not mention any damages remedy against the United States.[13] Finally, 43 U.S.C. 1349(a)(6), on which DeMenno/Kerdoon also relies (87-1359 Pet. 35-36), preserves causes of action but does not purport to mandate compensation of its own force.

3. Finally, this case would present no issue worthy of review even if petitioners were correct about the jurisdiction of the Claims Court. As the Claims Court noted (Pet.

[13] DeMenno/Kerdoon suggests (87-1359 Pet. 35 n.4) that this Court's decision in *Porter* v. *Warner Holding Co.,* 328 U.S. 395, 400 (1946), holds that a statutory provision authorizing enforcement of price controls implies a remedy for overcharges. In that case, however, the Court held that the statutory injunctive remedy implied that a court could use its equitable powers to require restitution. Recovery against the government, however, must rest on a statute creating an action for money damages, *United States* v. *Mitchell,* 463 U.S. at 216-217, not simply for equitable relief.

App. A25), petitioners alleged that DOI breached its contracts with petitioners during both the period after decontrol and the period when regulation was in effect. Because the ESA's exclusive jurisdiction does not apply to post-decontrol breaches, the Claims Court considered those allegations and found that petitioners had failed to exhaust their administrative remedies (*id.* at A25-A28). Petitioners have not challenged that holding in this Court, and they do not argue that they pursued their administrative remedies with respect to the alleged breaches that occurred while price controls were in effect. Petitioners' complaints also did not allege that they had complied with the Contract Disputes Act, 41 U.S.C. (& Supp. III) 601 *et seq.*, a necessary prerequisite for an action in the Claims Court on a contract covered by the Act. See, *e.g., LDG Timber Enterprises, Inc.* v. *United States,* 8 Cl. Ct. 445, 451-452 (1985) (failure to certify claim to contracting officer deprives Claims Court of jurisdiction).[14]

Moreover, this case presents no question of continuing importance. Despite petitioners' suggestions to the contrary, it involves only the special jurisdictional features governing now-expired price control regulations. The predominant federal energy policy since the decontrol of the price of oil has been "to wind up regulation of the oil

[14] Were the merits to be reached, it seems unlikely that petitioners would obtain any significant relief, even if they were to prevail on their miscertification claims, because they do not allege any significant harm: they do not claim that had DOI's certifications been timely they would have paid a lower price for the oil. Moreover, the Department of Energy is authorized to grant exceptions relief for certification errors such as petitioners allege (42 U.S.C. 7194), and has been prepared to do so in similar situations involving DOI. See *Department of the Interior—Laketon Asphalt Refining, Inc.,* 12 Energy Mgmt. (CCH) ¶ 81,012 (Dep't Interior 1984), review sought in *Laketon Asphalt Refining, Inc.* v. *DOE,* No. EV 84-264-C (S.D. Ind.)).

industry." *Johnson Oil Co.* v. *DOE,* 690 F.2d 191, 196 (Temp. Emer. Ct. App. 1982). Neither the substance of federal oil price regulation—which would determine the outcome of this case should the merits be reached—nor the scope of the exclusive jurisdiction created by Section 211 of the ESA has any ongoing significance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 87-1380

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TIPPERARY REFINING CO.,
Petitioner

v.

THE UNITED STATES,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY MEMORANDUM FOR THE PETITIONER

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1. The government misstates the holding of this Court in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), with respect to the standard to be applied in determining whether a later-enacted statute impliedly repeals an otherwise available Tucker Act remedy. In *Regional Rail* this Court held that the appropriate question is one of the intent of the legislature: " 'whether Congress intended to *prevent* . . . recourse [to the Tucker Act].' " 419 U.S. at 126, quoting the opinion of the Special Court in that case. And, the Court held, Congressional intent to make the Tucker Act remedy unavailable will not be inferred " 'unless there is "positive repugnancy" between the new [statute] and the [Tucker Act] that cannot be reconciled.' " 419 U.S. at 314. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016-1018 (1984) is to the same effect. The Court emphasized,

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* The listing required by Rule 28.1 of this Court's Rules is found at page 1, footnote 1, of the Petition and remains accurate.

quoting *Regional Rail,* that "when two statutes are " 'capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." ' " 467 U.S. at 1018 (quoting *Regional Rail,* 419 U.S. at 133-134; which quoted *Morton v. Mancari,* 417 U.S. 535, 551 (1974)).

Contrary to the government's implication (Opp. at 8), neither case held that there must be a threat of unconstitutional taking to save the Tucker Act remedy. The reference to the doubt of constitutionality in *Regional Rail* was in a paragraph simply applying the "canon of [statutory] construction" that it is advisable to avoid a statutory reading that would raise a constitutional question. 419 U.S. at 134. Similarly, *Ruckelshaus v. Monsanto* merely notes that its outcome moots a constitutional issue. 467 U.S. at 1019. Nothing in either holding indicates that its rationale depends on the need to avoid a constitutional issue.[1]

2. The government's opposition makes no attempt to show that there is any "clearly expressed" Congressional intention to "prevent . . . recourse" to the Tucker Act. *Regional Rail,* 419 U.S. at 126. Indeed, neither the ESA, the EPAA, nor their legislative history, makes any mention of the Tucker Act. Moreover, it is difficult, to say the least, to imagine that Congress wanted citizens to be

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[1] We submit, moreover, that there would indeed be a serious question of unconstitutional taking in the present case if the government, having exacted illegally high prices for crude oil in violation of its own contractual promise to comply with the DOE regulations, the Emergency Petroleum Allocation Act, and the Outer Continental Shelf Lands Act, could simply sit on that money and refuse to return it. Not denying this, the government engages in *non sequitur* by stating that this is not a problem because those claims "may go forward under the ESA and the EPAA" (Opp. at 9). The fact is that those questions will exist unless the holding in the present case is changed. Just as in *Regional Rail* and *Ruckelshaus v. Monsanto,* then, denial of a Tucker Act remedy in the present case raises a serious question of the constitutionality of the government's actions under the due process clause.

without remedy for government violations of both contractual promises to obey the price control regulations and the specific statutory command of section 27(b) of OCSLA, 43 U.S.C. § 1353(b), that the government abide by those rules.

3. The government asserts, however, that a congressional scheme preventing recourse to the Tucker Act in these circumstances can be gleaned from what it asserts is the command in section 211(a) of ESA that any *issue* involving the ESA, the EPAA, or the price control regulations may be heard only in the district court (Opp. at 7-10). Since the present case involves application of the regulations, the argument runs, the district court has exclusive jurisdiction over it. This argument lacks any merit.

a. The argument depends upon an aberrant reading of the phrase "cases or controversies *arising under* [the regulations]" in Section 211. The government does not deny that the obvious model for this phrase is the similar language in 28 U.S.C. § 1331, pursuant to which this Court held in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986), that a state negligence action did not "arise under" federal law even though every significant liability issue required resolution of questions under the Federal Food, Drug, and Cosmetic Act. Under that rationale, this case "arise[s] under" the Tucker Act, which creates the right to recover for violations of contract and the OCSLA. The cases relied on by the government (Opp. at 7) for the contrary proposition, such as *Citronelle-Mobile Gathering Inc. v. Gulf Oil Corp.*, 591 F.2d 711 (TECA), *cert. denied*, 444 U.S. 879 (1979), do not support its position. They concern only the appellate jurisdiction of the TECA under section 211(b)(2) of the ESA vis-a-vis that of the circuit courts of appeals. No trial court's jurisdiction under section 211(a) was at issue, and no such case holds that the "arising under" language in that section renders any injured person to be without a remedy.

b. The government's position disserves the very policy it purports to promote. The government asserts that it was Congress's policy to have swift and uniform interpretation of the price control regulations (Opp. at 10). But that policy is not served by creating a class of cases in which one large seller of crude oil—the government itself—may ignore the regulations while everyone else must comply with them. That is non-swift and non-uniform application of the regulations.

Moreover, the government is seriously wrong in suggesting that Congress insisted that every EPAA issue be considered only in the district courts. Congress has permitted other courts to consider large classes of issues requiring interpretation of the ESA, EPAA and the price control regulations. Thus the policy of "uniformity" cannot be read to express a Congressional preference that a violation of the regulations go unremedied rather than have a court other than a district court consider it. Most importantly, we showed in the Petition (at 20-21) that the Claims Court was explicitly given jurisdiction by Congress to rule upon the same regulations at issue here in the context of controversies under the Crude Oil Windfall Profits Tax Act, 26 U.S.C. § 4986 *et seq.*, which statutorily incorporates the DOE crude oil pricing regulations. Petition at 20. The government fails to respond to this showing. Moreover, as the government is forced to admit, section 211(a) of the ESA explicitly allows issues involving the ESA, EPAA, or the regulations to be ruled upon by state courts if they arise as part of a defense, so long as the issue is not the constitutionality or validity of the statute or agency action. Opp. at 8, fn 7. Thus the EPAA regulatory issues involved in the present case could arise and be ruled upon in the courts of any state.[2] It would thus not be anomal-

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[2] For example in an action by a seller asserting that the buyer had failed to pay the full contract price, the buyer could raise the defense that the contract price could not be paid because the seller's

ous for the Claims Court to rule on such issues in a contract case that could not be brought anywhere else.

c. The clear implication of TECA and Federal Circuit holdings is that this cause does not "arise under" the EPAA or its regulations within the meaning of section 211(a); therefore the Federal Circuit was wrong to hold that this case is within the exclusive jurisdiction of the district courts. The government's footnote response to this assertion (Opp. at 10, fn 10) tries to avoid its force by making the unsupported claim that the case arises under the EPAA although no relief is available. But that is not the reasoning of the TECA itself, which held in *Lunday-Thagard Co. v. United States Department of the Interior*, 773 F.2d 322, 324 (TECA), *cert. denied*, 474 U.S. 1055 (1987) that the ESA "does not provide the plaintiff with a cause of action for damages against the United States, except in fifth amendment taking cases." Thus that court's interpretation of the ESA is quite plainly that Congress created no route of redress in that statute for damages against the government. Therefore the present case does not "arise under" it, and section 211(a) of the ESA is inapplicable.

d. Finally, the government correctly points out that in *Merrell Dow*, this Court instructed that jurisdictional statutes be interpreted to give effect to their underlying purposes (Opp. at 10 and 9, fn 9). But the interpretation of the Federal Circuit permits the government's violation of its own regulation to go unchecked, leaves the petitioner without any remedy, creates a sizeable loophole in the enforcement scheme of the EPAA and ESA, and permits the Tucker Act to be partially repealed by implication. The government's claim that Congress intended these results is unsupported, and, we submit, could not be accepted without the most explicit and un-

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upper-tier crude certification was invalid. That defense could be ruled upon by a state court; it is the same issue raised by the petitioner as plaintiff below.

avoidable expression of Congressional intent. Such is the holding of *Regional Rail*, from which the holding of the Court below represents a significant departure.[3]

CONCLUSION

For the foregoing reasons, as well as those in the Petition, the writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 4, 1988

[3] The government tries to assert that the failure to exhaust administrative remedies that was the Federal Circuit's ground for dismissal of the claims concerning the post-decontrol period applies with equal force to the period of controls. Opp. 12-13. The courts below did not rely on that ground (Pet. App. 12a-13a), although it was strenuously argued by the government. For the pre-decontrol period, the official and undeviating agency position was that Interior did not have to comply with the DOE's price certification regulations. It refused to respond to written requests to claims that it was violating the regulations. Joint Appendix on Appeal, at p. 00271. A 1983 letter from Tipperary to Interior raising this issue was never responded to. *Id.* at p. 00332. Certainly, any further attempt to raise the question with the agency would have been futile and, thus, not required. *E.g., Bowen v. City of New York*, 476 U.S. 467, 485 (1986). It is clearly for these reasons that the courts below limited their holding on exhaustion to the post-decontrol period.